



Feb. 9, 2018

EPA Region 1 Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667

BY FOIA ONLINE

RE: FOIA Request Regarding Merrimack Generation Station Sampling Data

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), the Sierra Club respectfully requests copies of the following records¹ in EPA's possession related to the Merrimack Generating Station - Bow, New Hampshire; Permit No. NH0001465, issued by EPA Region 1 - and related to the Merrimack River, **to the extent not already in the online administrative record for renewal of the NPDES permit:**

- 1) Effluent/discharge data, particularly thermal data, from the Plant submitted to the EPA since 2012.
- 2) Temperature data from the Hooksett Pool of the Merrimack River, or in the reaches immediately upstream and downstream of the Hooksett Pool collected since Jan. 1, 2008.
- 3) Other water quality data, including background or ambient water quality in the Hooksett Pool of the Merrimack River, or in the reaches immediately upstream and downstream of the Hooksett Pool collected since Jan. 1, 2008.

It may be possible for us to further limit this request if we have a better idea of the nature and scope of the records in your files. Please contact me to discuss this possibility. In addition, to the extent that records responsive to this request are available in a widely-used electronic format (e.g., pdf, Excel, Word, or WordPerfect files), we would prefer to receive them in that format, provided that the electronic versions are in comprehensible form.

¹ As used throughout this letter, the terms "record" and "records" shall mean all materials in whatever form (handwritten, typed, electronic, or otherwise produced, recorded, reproduced or

stored) in EPA's possession, including, but not limited to, any correspondence, letters, minutes of meetings, memoranda, notes, e-mails, notices, electronic files, internet chat logs, tapes, photos, videos, text messages, and telefaxes. Note that this request specifically seeks responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any government purpose.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the Clean Water Act.

We also request that responsive records be released as soon as they are available, on a rolling basis, but in no event later than 20 days, as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send it immediately while EPA searches for other records.

REQUEST FOR FEE WAIVER

The Sierra Club requests a waiver of all fees in connection with this FOIA request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). FOIA carries a presumption of disclosure and Congress designed FOIA's fee waiver provision to allow nonprofit public interest groups—such as the Sierra Club—to access government documents without the payment of fees.

The Sierra Club is a national, non-profit environmental organization with no commercial interest in obtaining the requested information. Instead, our organization intends to use the requested information to inform the public so that the public can meaningfully participate in protecting the nation's natural resources.

As explained below, this FOIA request satisfies the factors listed in EPA's governing regulations for waiver or reduction of fees—as well as the requirements of fee waiver under the FOIA statute—that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l)(1). Courts have stated that the statute “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The subject matter of this request relates to EPA's role in administering the NPDES permitting program in New Hampshire and in monitoring and regulating the discharge of pollution from the Merrimack Station. EPA's actions in monitoring and regulating pollution under the Clean Water Act, as well as EPA's overall implementation and execution of environmental laws, are specific and identifiable activities of an executive branch agency of the government. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (“[R]easonable specificity” is “all that FOIA requires” with regard to this factor). Thus, this FOIA request plainly concerns the operations or activities of the government.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

There is no question that the records requested will be informative—they consist of data

on water quality in the Merrimack River and the discharges of an industrial facility that is a significant source of pollution to the Merrimack River. Likewise, the records are likely to contribute to an understanding of federal government operations because the request likely will result in disclosure of records not already in the public domain. Further, the requested records will provide important information regarding the impact of EPA's regulation of the Merrimack Station on the Merrimack River. Such information will allow better understanding of government operations, and in particular, the effectiveness of EPA's efforts "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," in particular, the Merrimack River. 33 U.S.C. § 1251(a) (Congressional declaration of the objective of the CWA). Further these records are not already publicly available through the administrative record website maintained by EPA Region 1 for the Merrimack Station NPDES permitting process. Thus, production of the requested records is "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2).

In this instance, the requested records will likely provide new information about the Merrimack Station's discharges under its NPDES permit and their impact on the health of the Merrimack River. See *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987) (FOIA's legislative history "suggests that information has more . . . potential [to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations."); *Community Legal Services v. HUD*, 405 F. Supp. 2d 553, 560 (E.D. Pa. 2005) ("[T]he CLS request would likely shed light on information that is new to the interested public.").

3. The disclosure of the requested information will contribute to "public understanding."

The information requested will contribute to public understanding of the effects of the Merrimack Station on the Merrimack River and the efficacy of EPA's operations in regulating the power station under the Clean Water Act. The information requested will also help provide Sierra Club, its members and supporters, and the public that Sierra Club disseminates information to with insight into these issues. The records' release is not only "likely to contribute," but is in fact certain to contribute significantly to better public understanding of the operations or activities of the government as described above. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2).

Public understanding of the new information will be achieved because Sierra Club intends to use the new information that it receives to educate the public about the impact of the Merrimack Station on the Merrimack River.

In determining whether the disclosure of requested information will contribute to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dep't of Justice*, 19 F.3d 807 (2d Cir. 1994). Sierra Club need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law requir[es] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for Sierra Club to show how it distributes information to the public generally. *Id.*

The Sierra Club also unquestionably has the “specialized knowledge” and “ability and intention” to broadly disseminate the information requested in a manner that contributes to the understanding of the “public-at-large.” Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club’s website, emailing and list serve distribution to members and supporters across the U.S., and via public meetings and events. Every year the Sierra Club website receives roughly 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day. Sierra Magazine, which is a quarterly magazine published by the Sierra Club, reaches more than one million people across North America. Sierra Club Insider, an electronic newsletter, goes to over 850,000 people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. Sierra Club’s detailed description of its capacity and will to disseminate information gathered from the requested records demonstrates that disclosure of the records will contribute to public understanding. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (requester demonstrates likelihood of contributing to public understanding of government operations and activities where it specifies multiple channels for disseminating information and estimated viewership numbers).

4. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

The foregoing discussion makes clear that disclosure is likely to provide new information to the public that will contribute significantly to its understanding of the implementation and effectiveness of pollution restrictions placed by EPA on the Merrimack Station. The request seeks information that is not publicly available about the pollution impacts on the Merrimack River from the Merrimack Generating Station’s operations subject to the terms of its EPA-issued NPDES permit through the release of water quality data that is not already in the public record, and Sierra Club has a documented history of disseminating information regarding issues, policies, and laws relating to the environment and public health. Accordingly, the requested records are likely to contribute significantly to public understanding of government operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2).

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

As noted above, the Sierra Club has no commercial interest in the requested records, nor does the Sierra Club have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The Sierra Club is a tax-exempt organization under section 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.

For all the foregoing reasons, dissemination of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government. Accordingly, we request that you waive all fees in connection

with this request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

If you deny this fee waiver request, in whole or in part, please notify us before incurring search and copy expenses.

CONCLUSION

Please email or (if it is not possible to email) mail the requested records to me at the office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

If you find that this request is unclear in any way, or that the number of records responsive to this request is relatively large or difficult to copy, please do not hesitate to call me at (212) 242-2355. You can also reach me by email at: edan@superlawgroup.com.

Thank you for your assistance.

Respectfully submitted,

Edan Rotenberg
Super Law Group
On behalf of Sierra Club

180 Maiden Lane, Suite 603
New York, NY 10038
Tel: (212) 242-2355
Email: edan@superlawgroup.com